No. 02-3

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RANDALL "TEX" COBB,

Petitioner,

—v.—

TIME, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals properly conduct an independent review of the record in a public figure libel case when it determined, based on undisputed facts, that there was no evidence of actual malice?

LIST OF PARTIES BELOW

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states as follows: Time Inc., a Delaware company, is indirectly wholly owned by AOL Time Warner Inc. AOL Time Warner Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

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TREATISES

Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* (1994) 12

Respondent respectfully submits that the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 30, 2002 should be denied because no question worthy of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

COUNTERSTATEMENT OF THE CASE

Proceedings Below

This action for defamation was commenced on September 21, 1994 by Randall "Tex" Cobb, a former professional boxer and sometime character actor, who was suspended indefinitely from boxing by the Florida State Athletic Commission ("FSAC") for failing a drug test conducted shortly after he participated in a fixed fight. Cobb sued *SPORTS ILLUSTRATED* magazine ("*SI*") regarding its publication of an article entitled "The Fix Was In," which dealt with the activities of Rick Parker, a Florida promoter who was responsible for fixing a number of bouts (the "Article"). On September 15, 1992, Cobb participated in one of those fixed bouts. The Article contained detailed allegations by Cobb's opponent in that fight, Sonny Barch, about Cobb's knowing involvement in the fixed fight and his use of drugs after the fight. (App. 1722)[1]

Prior to trial, the district court held that there was no evidence of actual malice on *SI*'s part in reporting that the Cobb-Barch bout had been fixed. Barch, the court stated, told that to *SI*, so testified before the FSAC and "other sources, such as Don Hazelton (FSAC's Execu-

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[1] Citations in the form App. __ are to the Joint Appendix filed below. Citations in the form of Pet. __ are to the Petition for Writ of Certiorari. Citations to Pet. App. __ are to the Appendices annexed to the Petition for Writ of Certiorari.

tive Director) corroborated that the fight was fixed." (App. 398) Accordingly, partial summary judgment was granted to *SI* on this issue. That the fight was fixed was not an issue at trial and is not at issue now. (*See* Pet. 5; fact "that the fight was fixed" was "undisputed")

The district court also held that the Article's implication that Cobb had been suspended after testing positive for cocaine after the fixed fight was substantially true. Cobb conceded that he was suspended because his post-fight drug test indicated marijuana use. In granting *SI*'s motion for summary judgment on this issue, the court concluded that the truthful "sting" of the Article was that "a professional boxer ingested an illegal drug prior to fighting and that such drug would likely affect his ability to box." (App. 408)

Nonetheless, the district court permitted the jury to consider Cobb's claim based on two closely related statements: (1) that Cobb "knowingly" participated in the fixed fight; and (2) that Cobb shared cocaine *after* the fight. (App. 1558) At trial, the jury heard uncontradicted evidence that in addition to Barch's account, *SI*'s journalists obtained and relied upon a great deal of evidence corroborating Barch's account of the events—most significantly, that Hazelton, the Executive Director of the FSAC and an eyewitness to the Cobb-Barch bout who had investigated the bout for the FSAC, told *SI* that the fight had been fixed and that he credited Barch's assertions that Cobb had knowingly participated in the fixed fight and had used cocaine after the fight. (App. 1527, 1530, 1539-40, 1547) The *SI* journalists also repeatedly viewed the tape of the fight and reached their own conclusion that Barch's story was credible. (App. 956, 978, 1067, 1113-14, 1289-90, 1353, 1642-43, 1647)

At the close of the trial, the jury returned a verdict in Cobb's favor in the amount of $8.5 million in compen-

satory damages and $2.2 million in punitive damages. (App. 503-506)

On September 8, 1999, the district court entered judgment affirming the award of punitive damages against *SI*. (App. 191) On July 8, 1999, *SI* filed its motion for judgment as a matter of law or in the alternative for a new trial or remittitur. (App. 520) The district court denied the motion on January 11, 2000. (Pet. App. 23a)

On *SI*'s appeal, the Sixth Circuit, after conducting an independent review of the record focused narrowly on the undisputed facts relevant to the two alleged defamatory statements at issue, unanimously held that the record did not support a finding of actual malice. The Court of Appeals accordingly reversed the district court's order and judgment and remanded for entry of judgment in favor of *SI*. (Pet. App. 3a) The full panel of the Sixth Circuit denied Cobb's Petition for a rehearing, with no judge voting to grant the application. (Pet. App. 1a)

Facts

The undisputed facts, presented at trial through the uncontroverted testimony of witnesses and *SI*'s contemporaneous interview notes, tapes and memoranda,[2] showed the following:

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[2] *SI* reporter Sonia Steptoe took notes at every interview and tape recorded many significant interviews, including those of Sonny Barch, Rob Russen, and Rick Parker. (App. 964, 992, 1017, 1071-72; vol. 7) Steptoe's notes of her interviews of Don Hazelton, Russen, Barch, Parker, and Cobb, and *SI* senior editor Steve Robinson's notes of conversations with Barch, Hazelton, *SI* investigator Marty Dardis, and *SI* Memphis stringer David Lyons, fully confirmed Steptoe and Robinson's testimony as to what they learned. (App. 972, 974-75, 1018-19, 1035, 1065; 1632, 1636; 1734-35, 1807-08, 1858-59, 1912, 1943-34, 2365-70) Steptoe also prepared memoranda concerning her

In mid-September 1993, *SI* senior editor Steve Robinson received a telephone call from Sonny Barch, who identified himself as a participant in a fixed fight promoted by Rick Parker in Fort Lauderdale, Florida in 1992. Barch told Robinson that Cobb had been his opponent in that fight and that Barch had also managed a boxer who participated in another Parker-promoted fixed fight. Barch told Robinson that he had given sworn testimony on these matters to Don Hazelton, the Executive Director of the FSAC. (App. 1614-15)

Robinson's first step in checking out Barch's account was to call Hazelton. (App. 1621) Hazelton's boxing credentials were impeccable: he had been the Director of the FSAC for almost five years when the Cobb-Barch fight occurred; he had attended the Cobb-Barch bout itself as well as every other boxing match in Florida during his tenure at the FSAC; he had conducted an investigation of the Cobb-Barch fight for the FSAC; and he previously served as the president of both the National Association of Boxing Commissions and the North American Boxing Union, as well as the Executive Director of the International Boxing Organization. (App. 1516-20, 1530)

Hazelton confirmed to Robinson that Barch had given sworn testimony to the FSAC supporting his allegations that there were "improprieties as far as that fight was concerned" and that in Hazelton's opinion, "the [Cobb-Barch] fight had been an arranged affair." (App. 1546)

After speaking with Hazelton, Robinson contacted Marty Dardis, an *SI* investigator who had had a long career in law enforcement in Florida. Dardis, who retired

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interviews on a nearly daily basis, and transmitted them electronically to Robinson and *SI* writer William Nack, who reviewed them as they came in. (App. 1035, 1248, 1626, 1629, 1800-01, 1847-48, 1854-56, 1920-21, 1945-46, 1966-67)

as chief investigator for Janet Reno prior to her appointment as Attorney General, knew Hazelton and confirmed his reliability. (App. 1624-25)

After speaking with Hazelton and Dardis, Robinson assigned Sonja Steptoe—who had more than eight years of experience reporting for *The Wall Street Journal* and *SI*—to investigate Barch's allegations. (App. 963, 965, 1625) Steptoe immediately flew to Tallahassee and interviewed Hazelton for two and a half to three hours that night and all the following day. Hazelton told Steptoe that Parker was a boxing promoter with a reputation for corrupt practices, and that certain fights that Parker had promoted in Fort Lauderdale in September 1992 had been fixed. (App. 970-77, 1548-50, 1801)

Hazelton told Steptoe that when he arrived at the weigh-in for the September 15, 1992 fights, Parker sought to substitute Barch for Tim Anderson, who had been scheduled to fight Cobb. Parker told Hazelton that "he would rather have Barch in there because he couldn't trust Anderson." Parker complained to Hazelton that Anderson wanted $5,000 for the fight, which Parker said he could not afford. Hazelton knew, however, that Barch had not fought in years and that he was not "in very good condition." Moreover, Anderson told Hazelton that he would fight Cobb for $2,500 or less. (App. 1521-24)

On the night of the fight, Hazelton saw Cobb arrive "very, very late"—only about twenty minutes before the fights were scheduled to begin. Barch, in turn, appeared "bone dry" when he arrived in the ring, a sign that he had not even bothered to warm up. Hazelton noted his further surprise that Barch did not even have anyone in his corner. (App. 1526, 1528)

Hazelton played a videotape of the fight for Steptoe. Barch's performance, he told her, was "one of the worst I have seen." Cobb, in his first "comeback" fight after a

four-and-a-half-year layoff—a televised fight—"lacked enthusiasm for the fight." Hazelton told Steptoe that "some arrangement had been made and that [Barch] was just in there to kneel down a few times and get out." Hazelton also told Steptoe that the other officials who were sitting at ringside for the Cobb-Barch fight had also concluded that it was an "arranged" or fixed fight. (App. 977, 1009, 1529-32, 1609-10)

Because the fight appeared so suspicious, Hazelton ordered both Cobb and Barch to undergo a surprise drug test immediately after its conclusion. Barch tested positive for cocaine, Cobb for marijuana. Hazelton imposed an indefinite suspension on both fighters. (App. 980-81, 1533-36, 1798-99)

Hazelton told Steptoe that he was contacted by Barch in the summer of 1993. Barch told Hazelton that Parker had induced him to "take a dive" in the Cobb fight, and that Cobb had come to his hotel room before the fight to discuss how Barch would do so in the first round. Hazelton described Barch telling him that he and Cobb had used cocaine after the fight in Parker's hotel room. Hazelton told Steptoe that Barch had later repeated these allegations in a sworn statement to the FSAC. (App. 1537-40)

Hazelton believed Barch. He told Steptoe that he "thought that the information [he] received from Barch was accurate," and that the tape of the fight "bears out everything" that Barch said. (App. 1541, 1547, 1556) Steptoe found Hazelton to be a "very credible" witness, with an "encyclopedic knowledge" of boxing. (App. 989)

Steptoe then interviewed Rob Russen, who had been Rick Parker's partner in the September 1992 Fort Lauderdale promotion and in other promotions during the preceding eight years. Russen told Steptoe that "everyone in

the know at the promotion" knew that Barch was "going in to take a dive." (App. 995-96)

Steptoe then spoke by telephone with Anderson for approximately an hour and a half. Anderson confirmed that Parker had substituted Barch for him as Cobb's opponent at the weigh-in. Anderson also told Steptoe that, while Parker had told people that the substitution was driven by Anderson's financial demands, the real reason was that "Sonny Barch was going to lay down for Tex Cobb in the first round." (App. 1004-05, 1856)

Finally, Steptoe and *SI* reporter William Nack, who had been a journalist for thirty years, interviewed Barch at his home in Arkansas. Steptoe and Nack spent two and a half to three hours with Barch on the evening of their arrival and interviewed him for several hours at his home during the next day. (App. 1011, 1016, 1274-78, 1627-28, 1921). Barch told them the same story he had told Robinson over the phone, providing more details about the fixed fight and Cobb's participation therein. (App. 1011-1014, 1020-34, 1277-84)

From the start, the *SI* journalists were well aware of the need for caution in evaluating Barch's allegations. He had admitted that he had thrown a fight and repeatedly abused drugs. He had asked for money from *SI*.[3] The record is plain that Barch's background caused the journalists to apply heightened scrutiny in evaluating his account and to take extra steps to investigate it. (App. 940, 1019-20, 1284-85, 1630-40)

Robinson, Nack and Steptoe repeatedly viewed the videotape of the Cobb-Barch bout and independently concluded that Cobb appeared to be fighting in a con-

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[3] *SI*'s payment to Barch is disclosed in the Article, and the magazine did not violate its own procedures in compensating Barch for his first-person account which accompanied the Article. (App. 1725; 932-38; 1616-17, 1678-79)

trived fashion. Robinson obtained the tape because he "wanted to make an independent assessment [of] what that fight looked like and whether that fight was in fact fixed." Robinson and Nack, both of whom had extensive experience in boxing,[4] as well as Steptoe and *SI* fact-checker Sally Guard, all concluded that Cobb's performance did not appear to be genuine. Steptoe testified that she thought that both boxers "looked like they were acting," that none of Cobb's punches had authority, and that most were not landing. It was "very clear" to Nack that this was a "rigged fight" in which Cobb was simply "trying to look good." Robinson noted that Cobb was "pulling his punches," and threw only glancing blows at Barch, even though Barch was doing little to protect himself. Robinson's viewing of the tape led him to believe that Barch had taken a dive and that Cobb "was part of it." Guard also concluded that the fight did not look legitimate. (App. 956, 978, 1067, 1113-14, 1289-90, 1353, 1642-43, 1647, vol. 6)

After interviewing Barch, Steptoe met with Parker at an Atlanta airport hotel. Parker denied most of Barch's allegations. Parker did corroborate Barch on one key point: he stated that he had replaced Anderson with Barch because Parker was not going to give Anderson the chance to "derail me" by beating Cobb. (App. 1077-78, 1962)

The record is undisputed that extensive efforts were made by *SI* to locate and to interview Cobb. Steptoe asked each person she interviewed whether he or she had Cobb's telephone number or knew how he could be contacted. She asked Parker to have Cobb contact her. She contacted Cobb's handler and left numerous messages

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[4] Robinson had seen "hundreds" of boxing matches and had served as *SI*'s boxing editor for nine years. Nack had seen dozens of fights and had covered boxing matches for various publications since 1972. (App. 1292, 1643)

for his Hollywood agent. She called Cobb's wife, sent two faxes to Cobb's home, and called a friend of Cobb and a magazine reporter who had interviewed Cobb on another matter. The faxes alerted Cobb that *SI* was working on a story that would contain allegations about the Cobb-Barch bout. (App. 1052-63, 1070-71, 1939-42)

Finally, on September 26, 1993, Cobb returned Steptoe's calls and messages. Cobb denied that he had participated in a fixed fight, and told Steptoe to watch the tape of the fight—statements that were set forth in the Article. Cobb declined Steptoe's request to fly to Nashville to meet him. (App. 1063-69, 1224) Cobb testified that he did not give Steptoe the name of anybody else she could talk to, nor did anyone on his behalf give Steptoe the names of anybody else she could talk to. (App. 1224-25)

At the end of the day, the *SI* journalists determined that the results of their research, interviews and review of the fight in question together supported the conclusion that Barch's account of Cobb's knowing participation in the fixed fight and post-fight use of drugs was credible. Cobb introduced no evidence at trial to dispute any evidence about *SI*'s activities, the investigative measures testified to by *SI* or the impact of such investigative findings upon the *SI* journalists' state of mind. It was upon this undisputed set of facts that the Court of Appeals properly determined that Cobb had failed to demonstrate that *SI* had acted with actual malice and that the judgment entered in Cobb's favor thus had to be reversed.

REASONS FOR DENYING THE WRIT

Summary of Argument

The single question presented for this Court's review does not reflect any conflict between this case and that decided by any other circuit. No such circuit conflict is even claimed. Nor is the Court of Appeals' decision inconsistent with that of any ruling of this Court. The sole issue considered by the Sixth Circuit, whether or not *SI* acted with actual malice, was decided correctly below on the basis of undisputed testimony and the Court's review of the record was entirely consistent with both the First and Seventh Amendments.

This is, in any event, hardly an appropriate case even to consider the issue sought to be raised by the Petition of a supposed "clash" between the First and Seventh Amendments. There is no ambiguity here that all the facts relevant to the issue of actual malice were undisputed and that it was thus unnecessary for the Court of Appeals to even reach the issue of deference to the jury's credibility determinations.

The Petition does *not* claim (as it cannot) that the Court of Appeals applied an incorrect standard of review or that its decision is inconsistent with this Court's decision in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989). What the Petition says, at most, is that the Court of Appeals failed to articulate its *methodology* for jury deference. In fact, the Court of Appeals clearly enumerated the "undisputed facts" upon which it based its conclusion that there was no evidence of actual malice. (Pet. App. 6a-13a; 21a) The Court of Appeals applied the correct standard of review and limited that review to the relevant undisputed facts of the case. There was no need for it to make additional findings—related to jury deference or otherwise—not relevant to the

actual malice determination, and there is no issue raised in this case that is worthy of this Court's review.

I.

The Court of Appeals' Decision Is Unworthy of Review by This Court Because It Is Not Inconsistent with That of Any Other Circuit or This Court, Is Clearly Correct and Is Entirely Consistent with Both the First and Seventh Amendments

A. There Is No Conflict Within the Circuits Applicable to the Court of Appeals' Decision

The standard of review that was articulated and applied by the Court of Appeals with regard to the issue of actual malice—the only issue raised in the Petition—is consistent with that applied by other circuit courts and this Court. Read closely, the Petition does not claim otherwise.

The standard articulated by the Court of Appeals was as follows:

> "Credibility determinations made by the trier of fact are reviewed under a clearly erroneous standard, but the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " (Pet. App. 16a, citing *Harte-Hanks*, 491 U.S. at 688, quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964))

Petitioner does not disagree—as he cannot—that the clearly erroneous standard is used when credibility determinations by a jury are at issue. *Harte-Hanks*, 491

U.S. at 688, citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Nor does —or can—Petitioner actually disagree with the Court of Appeals about the propriety of independent appellate review, a requirement embodied in cases ranging from *New York Times Co.*, 376 U.S. at 284-85 through *Harte-Hanks*, 491 U.S. at 688.

What, then, is the problem? The supposed vice of the ruling of the Court of Appeals, according to the single question presented for review, is that it "follow[ed] *no articulated method* for deferring to the jury's factual findings." (Pet. i, emphasis added) According to the Petition, the opinion "omitted the critical middle step, the step in which the rubber meets the road in appellate defamation practice" of "first identify[ing] and segregat[ing] those jury findings to which the 'clearly erroneous' standard applies." (Pet. 22) In effect, Petitioner complains that, although the Court of Appeals articulated the correct standard, it failed sufficiently to articulate in detail its "methodology" in applying that standard. (Pet. 3)

But this is the stuff of law school, not law. It is simply professorial grading of a judicial opinion with the student (the Court of Appeals, that is) failing the examination not for offering a "wrong" answer but for insufficiently fleshing out every possible premise of that answer. In real "appellate defamation practice," however, as in all appellate litigation, there is room for brevity as well as protracted analysis in judicial opinions. *See* Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 203 (1994) ("overwritten, needlessly encyclopedic opinions are no credit to a judge, a court, or the law, and most certainly of no help to lawyers").

There are, of course, cases in which it is useful for a court to specify at length all possible jury findings as to which one standard might apply as opposed to another. *See, e.g., Celle* v. *Filipino Reporter Enterprises Inc.*, 209

F.3d 163, 184 (2d Cir. 2000) ("This task [of independent review] is complicated in situations, such as the instant case, where the evidence turns in substantial measure on questions of credibility. . . ."). But this is hardly such a case. For this was the easiest of cases requiring reversal, one in which, as the court said, the critical facts were undisputed. *See, e.g.*, *Levan* v. *Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 n.27 (11th Cir. 1999) (concluding that there was no evidence of actual malice and noting that addressing the question of deference to facts found by the jury was unnecessary: "In this case, however, most of the crucial evidence that relates to the actual malice element is undisputed. . . ."); *Eastwood* v. *National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) ("Here, however, enough key facts are undisputed that we can reach a conclusion without interviewing—or ignoring—the jury."); *Newton* v. *National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990) (concluding that the uncontroverted facts revealed no evidence of actual malice "regardless" of whether or not the jury believed the journalists' testimony about their state of mind).[5] It is

[5] In *Harte-Hanks*, the undisputed facts themselves showed evidence of actual malice and the Court took into account the jury's determination that the newspaper's explanations for its omissions were not credible to conclude the record as a whole supported a finding of actual malice. 491 U.S. at 691-92. But where, as here, the undisputed facts show no evidence of actual malice, a jury's finding that the defendant's testimony was not credible is not sufficient by itself to constitute clear and convincing evidence of actual malice. As this Court stated in *Bose*: "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion. In this case [the discredited testimony] does not rebut any inference of actual malice that the record otherwise supports, but it is equally clear that it does not constitute clear and convincing evidence of actual malice." *Bose*, 466 U.S. at 512; *see also Newton*, 930 F.2d at 671 (a determination of actual malice "cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial").

also one in which proof of actual malice was all but non-existent and in which such proof as was offered failed to meet *any* test that *any* court has prescribed.

In such circumstances, there is no basis for the writ to be granted.

B. The Court of Appeals' Decision Was Based upon Its Review of Undisputed Facts Relevant to Actual Malice in a Manner Entirely Consistent with the First and Seventh Amendments

The Court of Appeals' review, far from being a free-roaming *de novo* review of the entire record (Pet. 11, 22), focused narrowly on the undisputed record facts relevant to the issue of actual malice. The Court of Appeals' opinion set forth clearly what the undisputed facts were that led the court to its decision without addressing more complex issues of no relevance to the resolution of so straightforward a case. It is no surprise that the ruling was unanimous and that not a single judge in the Circuit voted in favor of rehearing *en banc*.

The Court of Appeals began its analysis of the record by identifying the two alleged defamatory statements at issue, (1) "that Randall 'Tex' Cobb was a knowing participant in the fixing of his September, 1992 boxing match with Sonny Barch, and (2) that Cobb used cocaine with Barch after the boxing match." (Pet. App. 16a)[6] It then considered the facts underlying the grounds upon which Petitioner argued that he had demonstrated actual malice at trial, concluding that those facts were not even related to the *SI* journalists' belief in the accuracy of the two statements at issue.[7] (Pet. App. 16a-21a) It then

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[6] As Cobb's Petition raised no issue with respect to Cobb's drug use, we do not deal further with that subject.

[7] Petitioner asks that the Court impose "a rule that commands federal appellate courts, when reviewing a jury's finding of actual

turned to the "undisputed facts" in the record relevant to the question of actual malice and found that the conduct of *SI* was far from the kind of "purposeful avoidance of the truth" required by this Court's precedent, and that no inference of actual malice was warranted. (Pet. App. 21a-22a)

The Court of Appeals found that "the record in this case reveals undisputed facts which make it readily distinguishable from the *Harte-Hanks* and *Butts* [*Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)] cases," (Pet. App. 21a), chiefly because the *SI* reporters relied upon Hazelton, an independent witness and boxing expert of great stature, who "provided powerful corroboration for Barch's story," and because the journalists reviewed and relied upon the videotape of the fight themselves, which "provided *SI* with further reason to believe Barch's story." (Pet. App. 21a)

The Court of Appeals rejected Petitioner's argument that *SI* had "serious reasons" to doubt Barch sufficient to warrant an inference of actual malice for relying on such a source. It found that the record showed that "*SI* was aware of Barch's sketchy past," but that "the *SI* reporters acted accordingly," and determined that "[t]he *SI* reporters uncovered no particular reason to think that Barch was lying" with respect to the two statements at issue. (Pet. App. 17a-18a)

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malice, to constrain reexamination of predicate facts to review under a 'clearly erroneous' standard." (Pet. 12) But as this Court has observed, a single bright-line rule as respects what "facts" are relevant to a determination of actual malice that would be applicable to all cases is not possible, for "only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards." *Harte-Hanks*, 491 U.S. at 686, citing *Bose*, 466 U.S. at 503. Here, Petitioner would have the reviewing court adopt facts that were not even related to the defamatory statements at issue as "predicate" to a finding of actual malice.

As for the Petition's assertion that "*SI* never corroborated the defamatory statement" (Pet. 4), the Court of Appeals correctly recognized that the allegations at issue were not subject to direct corroboration because they involved "one-to-one conversations (with no witnesses) between Barch and Cobb." (Pet. App. 17a) It credited *SI* for its "attempt[ ] to corroborate as much of Barch's story as possible." (Pet. App. 17a)[8]

A close reading of the Petition reveals that, with only an exception or two, Petitioner even now does not take the position that the Court of Appeals erred in maintaining that the undisputed facts set forth in the court's opinion, as opposed to the irrelevant facts addressed in the Petition, were undisputed—or, indeed, that since they were undisputed, the jury verdict and judgment based upon that verdict had to be reversed.

The Petition's complaints about *this* case (as opposed to the 20 pages of other rulings surveyed) are of two sorts. The first is that the court relied far too much upon

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[8] The Petition wrongly contends that *SI* "could have traced Cobb's whereabouts during the afternoon of the fight to determine if the meeting in Barch's room had really occurred," noting that Cobb's corner-man, Neely Owens, testified that he was in Cobb's presence the entire day and did not see Cobb go into Barch's room the afternoon of the fight. (Pet. 8 & n.7) In fact, *SI* could not have readily obtained such information. Cobb testified that he did not give Steptoe the name of anybody else she could talk to, including Owens, nor did anyone on his behalf give Steptoe the names of anybody else she could talk to. (App. 1224-25) Owens testified that neither Cobb nor *SI* knew how to get in touch with him prior to the day he testified. There was no evidence that *SI* had any knowledge that there was any witness with information that would have contradicted the consistent picture that emerged during the course of *SI*'s investigation and interviews. Under these circumstances, no inference of "purposeful avoidance of the truth" can be drawn. *See contra Harte-Hanks*, 491 U.S. at 692 (evidence showed defendant was aware of key witness but did not make any effort to interview her).

the "completely immaterial fact" that the fight was fixed." (Pet. 5) This is a truly extraordinary statement in an actual malice case, since if Barch, the source of the information about the fixed fight and Cobb's participation in it, was speaking truthfully about the fact that the fight was fixed, the *SI* reporters could surely give more credence to the rest of what he said, notwithstanding his checkered past that was fully disclosed in the Article itself. *See St. Amant* v. *Thompson*, 390 U.S. 727, 731-33 (1968) (no actual malice even though defendant did not verify information received from source of unknown credibility since there were other reasons to believe source); *McFarlane* v. *Sheridan Square Press, Inc.*, 91 F.3d 1501, 1513-14 (D.C. Cir. 1996) (no actual malice as to alleged defamatory statements despite dubious character of source because publisher had other reasons to believe the article).

More striking still is the Petition's rather casual effort to take issue with only a very few facts relied upon by the Court of Appeals. One was the testimony of Don Hazelton. As the opinion stated, Hazelton told Steptoe, *SI's* correspondent, that he believed Barch and that he "thought that the information [he] received from Barch was accurate." (App. 1547; Pet. 9a) There was no dispute about this. In his briefing in the Court of Appeals, as in his briefing here, Petitioner simply ignores Hazelton's testimony to that effect. Since Cobb had told Hazelton precisely what he had told the *SI* journalists—that the fight was fixed *and* that Cobb knowingly participated in the fix—Hazelton's conclusion, which he offered to the *SI* journalists, went far, in and of itself, to providing ample basis for their crediting Barch's story. The same is true of Hazelton's conclusion that the tape of the fight "bears out everything that was said" about the fight by Barch. (App. at 1556; Pet. App. 9a)

It is no answer to this to say that Hazelton did not "corroborate" what Barch told him. (Pet. 5-7) What Hazelton did was to offer to the *SI* journalists his independent, expert assessment that Barch, who had appeared before and spoken with Hazelton himself on multiple occasions in the latter's role as Executive Director of the FSAC and as the head of that commission's investigation of the fight, had told the truth to both of them. According to Hazelton, Barch told him about, *inter alia*, discussing with Cobb the details of the fixed fight prior to the fight itself. Hazelton provided that and other information to Steptoe. Hazelton told Steptoe, as well, "that the information I received from Barch was accurate."

Of course, Hazelton could not *know* that this was the fact. Barch's description of what had occurred related to meetings in which he and Cobb met alone. But no one was in a better position to offer an informed judgment on these issues than Hazelton. He was the Executive Director of the Florida State Athletic Commission for five years prior to the Cobb/Barch bout and an eyewitness to the fight who personally conducted an investigation of the fight for the FSAC, including lengthy interviews of Barch. *SI* interviewed Hazelton over two days and viewed the tape of the fight repeatedly with him as he commented.[9]

The only other factual issue adverted to in the Petition is Cobb's contention that the testimony of the *SI* jour-

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[9] As for Petitioner's assertion that *SI* failed to interview Cobb's physician, trainer, or "boxing experts" (Pet. 8), as the Court of Appeals noted, Hazelton was "undoubtedly a boxing expert," and that "[a]lthough *SI* did not interview the referee or ringside officials, Hazelton did tell *SI* that he spoke with the ringside officials who agreed that the outcome was pre-determined." (Pet. App. 21a) In any event, there was no evidence, and no indication to *SI* during the course of its reporting, that any of these witnesses would have provided any information that would have undermined Barch's credibility as to the two defamatory statements at issue.

nalists that one reason that they believed Barch was their analysis of the tape of the fight itself had been rejected by the jury after being "judicially contradicted." The jury viewed the fight tape itself, Cobb argues, and Cobb offered a boxing expert who opined that he had not knowingly participated in the fixed fight in which he was engaged. But this misses the point that is central to any actual malice assessment by an appellate court.

The question is not what the jury concluded as to truth; it is whether there was sufficient evidence for a jury to conclude that the *SI* journalists did not *believe* what they printed or printed it with serious doubts as to its truth. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280-81 (1964) (recognizing key question is whether the statement constitutes "what the defendant believes to be truthful information . . . although the principal matters contained in the article may be untrue in fact . . . ."); *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."), *accord Harte-Hanks*, 491 U.S. at 688 (plaintiff must demonstrate that the defendant "actually had a high degree of awareness of . . . probable falsity"). There was no such evidence at all in this case.

The facts the Court of Appeals relied upon were undisputed. There are memoranda, notes and tapes of interviews in evidence which reflect, without contradiction, precisely what the reporters did and what they learned from each of their sources. The *SI* journalists' testimony as to the information they received, the beliefs they formed and the actions they took was uncontradicted. There was simply no need for the Court of Appeals to engage in review of additional facts which may have been disputed before the jury or to second-guess the

jury's credibility determinations on matters unrelated to the *SI* journalists' undisputed state of mind.

The Court of Appeals' review of the undisputed facts demonstrating *SI*'s good faith belief in the statements in the Article thus was perfectly consistent with the Seventh Amendment's required deference to the determinations of the jury. Any tension the Petition describes between the First and Seventh Amendments as a matter of abstract legal analysis simply is of no moment in this particular case. In these circumstances, there is no basis for the Court to grant plenary review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
July 29, 2002

RESPECTFULLY SUBMITTED,

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